No. 20332

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE EMILE BEAUREGARD,

Appellant,

vs.

WILLIAM H. WINGARD and ERNEST C. MICHAEL,

Appellees.

On Appeal From the United States District Court for Southern District of California, Southern Division.

APPELLEES' BRIEF.

McINNIS, FOCHT & FITZGERALD and
JAMES L. FOCHT,

1301 U.S. National Bank Bldg.,
San Diego, California,

Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of the Case.

Appellant sued appellees, William H. Wingard, Chief of Police of the City of Oceanside, California, and Ernest C. Michel [sued herein as Ernest C. Michael], a detective on the Oceanside Police Force. Appellant's Second Amended Complaint, upon which issue was joined and the case tried, purported to charge a violation of appellant's civil rights under 42 U.S. Code Section 1983. The complaint sought damages for "malicious prosecution." [C. T. 7.] In substance it alleged that appellees, acting in their official capacities and within the scope of their employment, maliciously arrested appellant without warrant or probable cause for

violation of Section 337a of the California Penal Code, the California bookmaking statute, that appellees acted pursuant to a malicious plan to force appellant into a compromising position to make it appear that he had committed the offense, that appellant was in fact innocent of the offense charged and was acquitted thereof.

Judge Weinberger denied appellees' motion to dismiss the Second Amended Complaint, his opinion appearing in *Beauregard v. Wingard,* 230 F. Supp. 167 [D.C.S.D. Cal., 1964]. We interpret Judge Weinberger's opinion as holding that the Second Amended Complaint stated a cause of action under 42 U.S. Code Section 1983, in that it charged that appellant was maliciously arrested by appellees without a warrant and without probable cause, not for the purpose of enforcing the law, but with an ulterior motive. (230 F. Supp. 185.)

After an extended jury trial Judge Kunzel, who presided at the trial in the District Court, submitted the case to the jury under a special verdict pursuant to Rule 49(a). It is stated in Appellant's Brief on page 5 thereof, "The case went to the jury on February 25, 1965, and it was not until February 24, 1965, and late on that date, that counsel knew that this matter was to be tried on the basis of special interrogatories under Rule 49(a)." This statement is incorrect. Counsel was advised of the Court's intention in this regard on February 19, 1965. [R. T. 634, 635.] In fact the record discloses that three or four months prior to the trial, counsel were requested by the Trial Court at a pretrial hearing to file interrogatories to be submitted to the jury. [R. T. 838.] On February 23. 1965. Judge Kunzel discussed with counsel the interrogatories he was

preparing. [R. T. 647, 655, 656.] Nineteen questions were submitted under the special verdict. The jury returned answers to all the questions to which answers were required. Appellant has quoted and discussed only the first three questions and answers under the special verdict. The complete list of questions and the answers thereto by the jury is as follows:

"1. Prior to the arest of plaintiff, did the defendant William H. Wingard have reasonable grounds upon which to base a suspicion that plaintiff was engaged in bookmaking?

Yes	0
No	12

2. Was the defendant William H. Wingard motivated by malice against plaintiff when he requested the defendant Ernest C. Michael and Gene Cowley to ascertain whether plaintiff would accept a bet?

Yes	12
No	0

3. Did the defendant William H. Wingard request the defendant Ernest C. Michael and Gene Cowley to determine whether the plaintiff would accept a bet motivated by reason of personal bias against the plaintiff, and not in the interest of law enforcement?

Yes	12
No	0

4. If your answer to question No. 2 is Yes—Did the defendant Ernest C. Michael have any knowledge that the defendant William H. Wingard was motivated by malice against plaintiff when he was requested to ascertain whether plaintiff would accept a bet?

Yes	0
No	12

5. If your answer to question No. 3 is Yes—Did the defendant Ernest C. Michael have any knowledge that the defendant William H. Wingard was motivated by reason of personal bias against plaintiff, and not in the interest of law enforcement when he was requested to ascertain whether plaintiff would accept a bet? Yes 0
No 12

6. If your answer to either of questions Nos. 4 or 5 is Yes—Did the defendant Ernest C. Michael, in effecting plaintiff's arrest, act in accordance with the purposes of the defendant William H. Wingard and not in the interest of law enforcement? Yes ___
No ___

7. Did the defendant Ernest C. Michael have reasonable grounds to believe that plaintiff had violated Section 337(a) of the California Penal Code when he effected plaintiff's arrest? Yes 12
No 0

8. Was the defendant Ernest C. Michael motivated by malice against plaintiff when he effected plaintiff's arrest? Yes 0
No 12

9. Did the defendant Ernest C. Michael effect plaintiff's arrest for reasons other than in the interest of law enforcement? Yes 0
No 12

10. Did the defendant William H. Wingard order the defendant Ernest C. Michael to sign the prosecution complaint against plaintiff? Yes ___
No ___

11. If your answer to question No. 10 is Yes—Did the defendant William H. Wingard have reasonable grounds to believe that plaintiff was guilty of violating Section 337(a) of the California Penal Code when he ordered Ernest C. Michael to sign the prosecution complaint? Yes ___ No ___

12. If your answer to question No. 11 is No—Was the defendant William H. Wingard motivated by malice against plaintiff in ordering the defendant Ernest C. Michael to sign the prosecution complaint? Yes ___ No ___

13. If your answer to question No. 11 is No—Was the defendant William H. Wingard motivated by personal bias against the plaintiff and not in the interest of law enforcement in ordering the defendant Ernest C. Michael to sign the prosecution ocmplaint? Yes ___ No ___

14. If your answer to either of questions 12 or 13 is Yes—Did the defendant Ernest C. Michael, in signing the prosecution complaint, act in accordance with the purpose of the defendant William H. Wingard and not in the interest of law enforcement? Yes ___ No ___

15. If your answer to question No. 10 is Yes—Did the defendant Ernest C. Michael sign the prosecution complaint be reason of an order of William H. Wingard rather than upon his own initiative? Yes ___ No ___

16. Did the defendant Ernest C. Michael make a full and fair disclosure of the material events leading up to the arrest and of the arrest of plaintiff, to Claude Brown, the Deputy District Attorney? Yes 12
No 0

17. Did the defendant Ernest C. Michael have reasonable ground to believe that plaintiff had violated Section 337(a) of the California Penal Code when he signed the prosecution complaint? Yes 12
No 0

18. If your answer to questions Nos. 16 and 17 are No— Was the defendant Ernest C. Michael motivated by malice against plaintiff when he signed the prosecution complaint? Yes ___
No ___

19. If your answer to question No. 18 is Yes— Did the defendant Ernest C. Michael sign the prosecution complaint for reason other than in the interest of law enforcement? Yes ___
No ___

Thereafter the Trial Judge gave judgment in favor of appellees on the special verdict and also rendered its "MEMORANDUM OF DECISION AND FINDINGS ON THE ISSUE OF ENTRAPMENT." [C. T. 138.] In the latter Judge Kunzel analyzes the basis for his determination that the answers to the questions under the special verdict require a judgment in favor of appellees and he also made a finding on the issue of entrapment. The Trial Judge stated in the

above "Memorandum of Decision and Findings On The Issue Of Entrapment":

> "Although it is not deemed necessary to support the judgment in favor of the defendant Wingard, a finding on the issue of entrapment will be made in accordance with Fed. R. Civ. P. 49(a), as follows. The court finds that it is true that: (1) Officer Gene Cowley, a Deputy Sheriff of San Diego County, entered plaintiff's place of business about 1 P.M., August 30, 1960; (2) that Gene Cowley told plaintiff he was a friend of Jimmy Cusenza; (3) that Cowley told plaintiff that Jimmy Cusenza had told him about the "set up and that Cowley wanted to place a bet on a horse running in the fifth race at Del Mar, and that plaintiff accepted $10.00 to bet on the horse; and (4) that Jimmy Cusenza was at one time the owner of a bar in Oceanside which required special police surveillance, and had at one time been convicted of gambling, and had been denied a bail bond broker's license by the State of California because of his poor character. From the foregoing finding of fact it is concluded that plaintiff was neither entrapped nor induced to accept the bet." [C. T. 143, 144.]

In the same Memorandum of Decision Judge Kunzel commented on the lack of support for the answers given by the jury to the first three questions under the special verdict. [C. T. 144, 145.] The Trial Judge's reaction to these three answers also appears in the reporter's transcript. [R. T. 900, 901.] It is summarized in these words, "I believe that the evidence is somewhat overwhelming that Chief Wingard did have reasonable grounds to suspect the defendant." [R. T. 901.]

Statement of Facts.

The Statement of Facts contained in Appellant's Brief is an argumentative presentation of portions of testimony that favored appellant's cause, largely extracts from the testimony of appellant himself. Also incorporated in appellant's "Statement Of Facts" is material of dubious propriety such as extracts from appellant's own trial memorandum in the form of alleged comments made by the San Diego County Superior Court Judge during appellant's trial for bookmaking. (App. Br. p. 26.) [We likewise question the propriety of the "off the record" comment on page 32 of Appellant's Brief that the same Superior Court Judge stated that many judges of the Superior Court of San Diego County carry bets to the track for fellow judges.]

A statement of facts supported by the evidence less favorable to appellant's cause is as follows:

Several weeks prior to appellant's arrest, appellee Wingard was informed by Captain Ward Ratcliff of the Oceanside Police Department that he, Captain Ward Ratcliff, had received an anonymous phone call informing him that appellant Beauregard was engaged in bookmaking. [R. T. 405, 409.] Wingard's testimony in this regard was corroborated by the testimony of Ratcliff who is not a party to the present litigation. [R. T. 507.] Several days thereafter Chief Wingard himself received an anonymous phone call giving the same information. [R. T. 406, 436.] It is not uncommon for such informants to decline to identify themselves. [R. T. 507.]

Following the receipt of this information Wingard made a number of observations of appellant's business

premises. His suspicions were aroused by the number of people frequenting the premises and also by the presence of Jimmy Cusenza, a bar owner whose establishment was under police surveillance and whose F.B.I. rap sheet showed gambling and whose application for a bail bond broker's license had been turned down by the California Insurance Commissioner due to his bad character. [R. T. 550, 551.]

Thereafter appellee Wingard went to the San Diego County District Attorney's Office and requested that office to furnish an undercover investigator. The District Attorney's Office did not have such a man available and suggested that he seek such assistance from the San Diego County Sheriff's Department [R. T. 447.] A Deputy Sheriff, Gene Cowley, was furnished by the Sheriff's Department to assist the Oceanside Police Department. [R. T. 447, 421.]

Chief Wingard's only prior contact with the Beauregards was on an occasion several years before when appellant came to the Wingard residence to report that his wife had been receiving threatening phone calls. Appellee Wingard then visited Mrs. Beauregard and discussed the calls and suggested that the Beauregards obtain an unlisted number. [R. T. 399, 400.] This testimony of Chief Wingard was corroborated by the testimony of his wife, Mrs. Wingard. [R. T. 486, 487.]

Chief Wingard unequivocally denied that he ever warned appellant Beauregard not to criticize the Oceanside Police Department and denied that he knew or had any information that appellant had ever criticized either himself or the Police Department. [R. T. 448, 392.] He had no connection with politics nor with any political campaign of appellant. [R. T. 395, 396, 397.]

Appellee Wingard was under Civil Service, had tenure, and could not be discharged from his position except for cause. [R. T. 448.] On the morning of the incident in question Wingard instructed Michel to work with Deputy Sheriff Cowley and see whether appellant Beauregard would accept a bet. [R. T. 282.] He advised Michael and Cowley of his suspicions that appellant was engaging in bookmaking and furnished them money to use in placing a bet, but gave no specific instructions as to how the attempt to place the bet should be made. [R. T. 423, 424.] Chief Wingard did not give directions that appellant Beauregard be arrested. [R. T. 331.]

Following this meeting with Chief Wingard, Michel and Cowley decided upon the procedure whereby appellant would be approached regarding a bet. [R. T. 198, 199, 286.]

Cowley entered appellant's store and said, "Jimmy told me about the setup," that he knew about a longshot in the fifth called Ole Snuggler and wanted to bet $10.00 on it to win. He gave appellant the $10.00 and a notation of the bet was made on a slip of paper furnished by appellant. [R. T. 211, 238, 239, 261.] He stated to Cowley, "Boy, when Belmont opens, I will really make book." [R. T. 241.] Cowley then left by the front door and appellant left by the rear door of his establishment. [R. T. 239.] According to Cowley appellant did not offer to take him to the track [R. T. 208.]

The front of the store faces west. [See Pltf. Exs. 2 and 3.] After leaving the front door Cowley told Michel, who had remained on the sidewalk to the north of the entrance of the store, that he had made the bet

and was leaving via the rear of the store. [245, 303, 304.] Michel and Cowley ran north on the sidewalk, around the corner of the north intersecting street, and south down the alley behind the store where appellant was intercepted. [R. T. 245, 246, 304, 305.] Michel asked appellant if he had taken a bet from Cowley and appellant at first replied that he had not and had never seen Cowley before. [R. T. 246, 306.] After two or three denials he admitted taking the bet. [R. T. 306.] The betting marker was on appellant's person when he was arrested and is in evidence as defendants' Exhibit "H". [R. T. 249, 127.] Appellant admitted in his testimony that he accepted the $10.00 from Cowley with the intention of taking it to the track and placing the bet. [R. T. 126.]

On appellant's person when arrested was a slip of paper [Deft. Ex. "B"], with the name and phone number of one, Barthel, a recently convicted bookmaker. [R. T. 113, 142, 328, 504.]

Appellant's version of events immediately preceding the arrest is discussed at page 19 of Appellant's Brief. Under this version Michel was waiting for him at the rear door of the store and arrested him as soon as he stepped out of the door and before Cowley came down the alley advising Michel that the bet had been accepted. Not only was this version refuted by the testimony of Michel and Cowley, but the testimony of these officers was corroborated by the testimony of the independent witness, John Higdon. The latter was sales manager for a car lot which fronted on the same side of the street as appellant's establishment and was situated to the north thereof. He observed Michel on the sidewalk by the car lot when Cowley came hurry-

ing up the street saying to Michel, "He went out the backway," and the two officers ran up the street, around the corner, and down the alley. [R. T. 377, 378.]

At the Oceanside Police Station appellant admitted to appellee Wingard that he had taken the bet. [R. T. 405.] Appellee Wingard in his testimony denied that he made the statement attributed to him by appellant such as "Frenchie, I set this up," and "book the son-of-a-bitch for a felony." [R. T. 451.] Appellee Michel also denied that the events which transpired while appellant was in the Police Station were as testified to by appellant [R. T. 316, *et seq.*], and denied the occurrence of the conversation testified to by appellant wherein it is asserted that Michel originally was booking appellant for a misdemeanor and was ordered by Chief Wingard to change the booking to a felony. [R. T. 319.]

Following appellant's arrest and release Michel presented the facts to one of the chief deputies in the District Attorney's Office, Claude Brown. Mr. Brown stated there was probable cause for the issuance of a felony bookmaking complaint and his office prepared such a complaint which Michel signed. [R. T. 513, 517.] Following appellant's original arrest Michel received no instructions regarding the prosecution from appellee Wingard. [R. T. 513.] Following a preliminary hearing appellant was bound over for trial on the charge of which he was ultimately acquitted. [R. T. 128.]

Significantly absent from the statement of facts in Appellant's Brief is any reference to the testimony of the witness called on behalf of appellees, Mrs. Isabella Kennedy. This witness testified that on the Saturday following September 6, 1961, she was with her husband, now deceased, when he placed a $20.00 bet on a

horse with appellant Beauregard in the latter's establishment. [R. T. 495, *et. seq.*] Her husband had been referred to appellant's establishment by another apparent horse player when he had mentioned that he wished to bet a horse, " 'Why, don't you take it up here to Frenchie?' That was the name he gave me—Frenchie—and he directed us to the place." [R. T. 496.] Appellant was an extensive user of a horse racing information service in Los Angeles known as Turf Craft, [R. T. 111, *et. seq.*] Records of his phone calls to Turf Craft are in evidence as defendants' Exhibit "C". Appellant was still utilizing the services of Turf Craft during the month of September, 1961. [R. T. 579, 580.]

Appellant's brief refers to the testimony of Allen Podgers called as a witness on behalf of appellant. When Podgers was tried for the crime of arson in 1958, appellant Beauregard testified on his behalf. [R. T. 672.] That trial resulted in a hung jury. [R. T. 626, 674.]

Podgers testified to certain admissions assertedly made to him by appellee Michel. Michel's version of his conversations with Podgers contradicted the latter's testimony. [R. T. 665, 666.] Michel further testified that on one occasion he had the following conversation with Podgers:

> "I said, 'Could you tell me anything about his operation?'
>
> And he just kind of smiled and laughed and as he was letting me out, I said, 'Just answer me one question,' and I asked him to relate yes or no, if Frenchy was a bookmaker, to which he replied, 'Yes,' and I left the apartment and I haven't talked to the man since." [R. T. 666, 667.]

The testimony regarding the events surrounding appellant's arrest as related by appellant was in utter conflict with that of appellees' witnesses. The jury rejected appellant's version. Counsel for appellant noted in his brief (App. Br. p. 15) that the Trial Judge commented on the discrepancies in the testimony and the apparent existence of perjury. It is apparent from Judge Kunzel's later comments in the transcript [R. T. 900, 901], and in his Memorandum of Decision and Findings on the Issue of Entrapment that in his opinion the taint of perjury was on appellant's testimony.

ARGUMENT.

I.

The Answers of the Jury to the First Three Questions Under the Special Verdict Do Not Affect the Correctness of the Judgment for Appellees Rendered by the Trial Court.

Following the rendition by the jury of its special verdict the Trial Judge commented upon the fact that the finding of the jury amounted to no more than a finding that appellee Wingard maliciously requested Michel and Cowley to make an investigation. [R. T. 883, 899.] While he sharply disagreed with the jury's finding of malice and lack of probable cause as to appellee Wingard as reflected in the answers to the first three questions, nevertheless, the acceptance of the jury's finding failed to demonstrate any semblance of a cause of action. [R. T. 899.]

By its answers to the other questions the jury in effect found that there was no conspiracy or malicious consort between appellees Wingard and Michel, that there was no false arrest of appellant, that his arrest by Michel was not activated by malice but was in the interest of law enforcement and based upon probable cause, that Wingard did not order Michel to sign the prosecution complaint and that Michel when he signed the prosecution complaint had reasonable grounds to believe appellant guilty of the offense charged and that he made a full and fair disclosure to the Deputy District Attorney who issued the complaint. In effect, the jury found there was no false arrest and no malicious prosecution.

Counsel for appellant has not cited, and to our knowledge there does not exist, authority that the malicious

instituting of an investigation by a law enforcement officer constitutes a civil cause of action, much less a violation of federally guaranteed constitutional rights.

All analogous authorities support the soundness of the Trial Court's decision. Even though the jury found that there was no malicious prosecution of appellant, if it be contended that appellee Wingard's malicious activation of an investigation smacks of malicious prosecution appellant is faced with the rule that law enforcement officers are immune from suit for malicious prosecution. Law enforcement officers enjoy a classic common-law immunity from civil liability for malicious prosecution. This is recognized by such California and Federal decisions as *White v. Towers,* 37 Cal. 2d 727, 235 P. 2d 209; *Coverstone v. Davies,* 38 Cal. 2d 315, 239 P. 2d 876; *Hardy v. Vial,* 48 Cal. 2d 577, 582, 311 P. 2d 494, 496; *Laughlin v. Garnett,* App. D. C., 138 F. 2d 931, cert. den. 322 U.S. 738, 64 S. Ct. 1055; *Springfield v. Carter,* 8 Cir., 175 F. 2d 914; *Cooper v. O'Connor,* App. D. C., 99 F. 2d 135, 118 A.L.R. 1440, cert. den., 305 U.S. 643, 59 S. Ct. 146; *Phelps v. Dawson,* 8 Cir., 97 F. 2d 339 (citing as authority United States Supreme Court and English cases).

The above-cited case of *Hardy v. Vial,* 48 Cal. 2d 577, 311 P. 2d 494, is pertinent. In applying the rule of absolute immunity to certain state college officials who were alleged to have maliciously and without probable cause made charges and caused the institution of official proceedings leading to the discharge of a professor, the opinion states (at 48 Cal. 2d 583, 311 P. 2d 497):

> "The policy on which the rule is based would be defeated if it were held that whenever an officer uses his office for a personal motive not connected with the public good he acts outside his power."

The opinion cites many cases and quotes the policy underlying the doctrine of absolute immunity as stated by Judge Learned Hand in *Gregoire v. Biddle,* 177 F. 2d 578, 581.

In *Springfield v. Carter,* 8 Cir., 175 F. 2d 914, 918, the court stated:

> "The established rule of law is that when a prosecution is instituted by public officers, acting within the scope of their official duties, it is against public policy to allow an action for malicious prosecution to be maintained against them on account of such official acts 'although probable cause be absent and malice be present in their enforcement of the law'. Gibson vs. Reynolds, 8 Cir., 172 F. 2d 95, 97; Adams vs. Home Owners' Loan Corporation, 8 Cir., 107 F. 2d 139, 141; Phelps vs. Dawson, supra; Cooper vs. O'Connor, supra; Spalding vs. Cilas, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780."

Plaintiff appellant's Second Amended Complaint as well as his earlier pleadings alleges that the defendant appellees acted within the scope of their authority [Paragraphs IV and V of plaintiff's Second Amended Complaint, C. T. 2], and this has been admitted by all parties.

The case of *Anderson v. Rohrer,* 3 F. Supp. 367 [S. D. Florida], is of interest because of the similarity the charges of the plaintiff therein bears to the allegations of appellant herein. In that case it was charged that a public officer together with another did conspire, combine and confederate together to falsely procure plaintiff to be charged with an offense which was dismissed for lack of probable cause and did thereafter

maliciously procure a false indictment against plaintiff which was quashed for lack of evidence. The opinion states:

> "Plaintiff alleges, however, that such acts were maliciously and corruptly done, which, plaintiff argues, discloses a perversion of that office, which strips the defendant of immunity as a public officer. A complete answer to this contention is found in Spalding v. Vilas, 161 U.S. 483, 16 S. Ct. 631, 635, 40 L. Ed. 780, in which the rule is settled that a public officer is not liable for instituting a prosecution, although he acts with malice and without probable cause, provided the matters acted upon are amongst those generally committed by law to the control or supervision of the office in question and are not manifestly or palpably beyond the authority of such office.
>
> * * *
>
> The opinion in Spalding v. Vilas reviews many cases holding that official acts, including the institution of prosecutions, not manifestly or palpably beyond the authority of the office, are not actionable even though the officer acted with mala fides, or with actual malice, or without any reasonable or probable cause, or with knowledge of the falsity of his acts. The opinion concludes with this sentence which is controlling upon the demurrer now before the court. 'If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant [officer] acted maliciously, that could not change the law.'" (3 F. Supp. 367, 368.)

In *Adams v. Home Owners' Loan Corp.*, 8 Cir., 107 F. 2d 139, malicious prosecution was charged based

upon allegations that officers of a governmental agency "maliciously caused the indictment to be founded upon fraudulent evidence". The opinion cites *Phelps v. Dawson, supra,* and *Cooper v. O'Connor, supra,* in holding that the plaintiff had no cause of action regardless of whether the officers "entertained malice toward the plaintiff or whether they acted in bad faith and without probable cause."

The decision in *Cohen v. Norris,* 9 Cir., 300 F. 2d 24, 33, recognizes that "a generally recognized common-law immunity" would be a defense in a Civil Rights Act case.

In *Sires v. Cole,* 9 Cir., 320 F. 2d 877, this Court held that the Civil Rights Act creates no exception to the classic immunity enjoyed by judges, prosecuting attorneys and deputies.

Other cases from this Circuit recognizing that traditional immunities are not abrogated by the Civil Rights Act are *Arnold v. Bostick,* 9 Cir., 339 F. 2d 879, and *Haldane v. Chagnan,* 9 Cir., 345 F. 2d 601. Each of the above-cited cases cites with approval the holding of the Supreme Court of the United States in *Bradley v. Fisher,* 13 Wall. 335, 20 L. Ed. 646, that immunity is not affected by malice or improper motive. The immunity remains "irrespective of the motives with which those acts are alleged to have been performed" (339 F. 2d at page 880), and even though the "actions were motivated by corruption, malice, or other improper considerations". (345 F. 2d at page 604.) In the recent case of *Byrne v. Kysar,* 7 Cir., 347 F. 2d 734, 736, it was recognized that a prosecuting officer was entitled to the same immunity from liability under the Civil Rights Act as a judge.

The immunity of law enforcement officers is a phase of the doctrine of "judicial immunity" (See Annotation 28 A.L.R. 2d 646, 650); *White v. Towers,* 37 Cal. 2d 727, 235 P. 2d 209; *Phelps v. Dawson,* 8 Cir., 97 F. 2d 339. Such immunity from liability for malicious prosecution is extended to law enforcement officers for, as stated in *Phelps v. Dawson,* 8 Cir., 97 F. 2d 339, 340:

> "The reason is that, in instituting such a charge, he is acting in a so-called quasi-judicial capacity connected with the enforcement of the criminal law. Broadly speaking it is his official duty to institute such proceedings . . . The public welfare requires that this choice shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make that assurance positive and definite by securing him against even actions based upon a malicious abuse of his official power."

In *Rhodes v. Meyer,* 8 Cir., 334 F. 2d 709, cert. den., 379 U.S. 915, 85 S. Ct. 263, in affirming traditional concepts of immunity including those enjoyed by law enforcement officers, the opinion states:

> "This court has also since made a survey of the cases citing Monroe to see what effect, if any, it may have on the traditional concepts of immunity. We find there is overwhelming support for the position that judicial immunity and its derivative quasi-judicial immunity have not been affected by Monroe. See Harvey v. Sadler, 9 Cir., 331 F. 2d 387 (1964); Agnew v. Moody, 9 Cir., 330 F. 2d 868 (1964) (citing Houston with approval); Ray v. Huddeston, W. D. Ky., 212 F. Supp. 343, a'ffd,

6 Cir., 327 F. 2d 61 (1964); Crawford v. Zeitler, 6 Cir., 326 F. 2d 119 (1964); Duzynski v. Nosal, 7 Cir., 324 F. 2d 924 (1963) (citing Houston with approval); Hurburt v. Graham, 6 Cir., 323 F. 2d 723 (1963); Sires v. Cole, 9 Cir., 320 F. 2d 877 (1963); Nesmith v. Alford, 5 Cir., 318 F. 2d 110 (1963); Weller v. Dickson, 9 Cir., 314 F. 2d 598 (1963); Kostal v. Stoner, 10 Cir., 292 F. 2d 492 (1961); Basista v. Weir, W.D. Pa., 225 F. Supp. 619 (1964); Norton v. McShane, 5 Cir., 332 F. 2d 855 (1964). (334 F. 2d 718.)

In *Diaz v. Chatterton,* 229 F. Supp. 19 [D.C.S.D. Cal.], a civil rights case wherein plaintiff charged various defendants with wrongfully conspiring to file a criminal complaint against him, bribe witnesses to present false testimony, maintaining an action against him out of passion and prejudice, etc., it was held:

> "Defendant Chatterton being a Deputy District Attorney for Orange County, California, is immune from the within suit." (229 F. Supp. 22.)

We have cited the above authorities in what is probably an excess of caution. As found by the Trial Court, instituting an investigation, though without probable cause and motivated by malice, is neither a civil tort, nor a violation of the Civil Rights Act. We have cited the authorities to illustrate the extent to which the courts have held that malice and improper motives do not subject the public officer to liability for acts done within the scope of his authority even though the acts go far beyond those of appellee Wingard in the present case, even to the extent of the tort of malicious prosecution.

We commend to this Honorable Court the language of the opinion in the case of *Phillips v. Nash,* 2 Cir., 311 F. 2d 513, cert. den., 374 U.S. 809, 83 S. Ct. 1700. In that case, a Civil Rights case, the plaintiff sued a state official for damages under 42 U.S.C., Section 1983, on the ground he was deprived of his constitutional guarantee of a speedy trial. In holding that the defendant state official was not subject to suit under the Civil Rights Act the opinion states (311 F. 2d 516):

> "The instant case is a far cry from the situation in Monroe vs. Pape. We think it will be time enough to say the federal Civil Rights Act permits any person who has been prosecuted by a State's Attorney or an Assistant State's Attorney to sue such official under the federal Civil Rights Act when and if Congress so determines or when and if the Supreme Court announces an extension of its holding in Monroe vs. Pape.
>
> * * *
>
> We are convinced that Congress never intended, by the enactment of the Civil Rights Act, to open the federal courts to suits to be brought by those persons who have been prosecuted by a State's Attorney and who claim that such official acted with malice, or otherwise did not fully comply with his official duties. We should not, by judicial fiat, convert what would otherwise be ordinary state-law claims for false imprisonment, malicious prosecution or assault and battery into Civil Rights cases merely on the basis of conclusory allegations in a complaint that constitutional rights have been violated."

II.

Appellant's Contentions as to the Judgment in Favor of Appellee Michel Are Without Merit.

Appellant's contention that the Trial Court erred in failing to render judgment against appellee Michel requires little comment. As stated above, the jury found that there was no false arrest, no malicious prosecution and, in effect, that there was no conspiracy between appellees Wingard and Michel. The case of *Nesmith v. Alford,* 5 Cir., 318 F. 2d 110, cited by appellant in support of his contention as to Michel is not in point. In that case a number of officers were active participants in a false arrest.

III.

There Was No "Wrongful Arrest" of Appellant.

The "wrongful arrest" to which appellant refers in his brief (App. Br. p. 29), simply did not occur. The jury found in its answer to Interrogatory No. 7 that there was probable cause for the arrest of appellant for violation of Section 337a of the California Penal Code. The pertinent provisions of this section are:

"Every person,

* * *

(3) Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of

being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, or any lot, chance, casualty, unknown or contingent event whatsoever.

* * *

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year. This section shall apply not only to persons who may commit any of the acts designated in subdivisions one to six inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions one to six inclusive."

Violation of Penal Code Section 337a is a felony unless or until judgment has been pronounced assessing a penalty less than confinement in a state prison. (*People v. McLaughlin,* 111 Cal. App. 2d 781, 792, 245 P. 2d 1076.)

Section 836 of the California Penal Code provides as follows:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

The findings of the jury that there was probable cause for the arrest are amply supported by the evidence. Indeed, the testimony of the disinterested witness, Isabella Kennedy, is sufficient to utterly discredit appellant's testimony and would justify the conclusion that appellant, at the time in question, was in fact a professional bookmaker.

IV.

There Was No Error in the Trial Court's Rulings Regarding "Entrapment".

Appellant submitted no proposed instructions on entrapment and submitted no proposed interrogatories on the subject under the special verdict. Appellant's Brief (at page 65) refers to his objection and exception to the Trial Court's treatment of the matter of entrapment. The record discloses that during a discussion with counsel the Trial Judge expressed his opinion that under the evidence there was not "entrapment as a matter of law", and the following exchange took place:

> "Mr. Schwartz: Let the record show that I do disagree with His Honor and do take an exception.
>
> The Court: To what?
>
> Mr. Schwartz: That entrapment as a matter of law is not involved here. I think it is." [R. T. 798.]

In its MEMORANDUM OF DECISION AND FINDINGS ON THE ISSUE OF ENTRAPMENT the Trial Court gave the basis for its determination that the evidence does not warrant a finding "that there was entrapment as a matter of law". [C. T. 143.] The Trial Court in the above-cited Memorandum, although expressing the opinion that it was not necessary to support judgment against appellant, proceeded to make a finding of fact that there as no entrapment. [C. T. 143.] The Trial Court's finding in that regard is quoted under the Statement of the Case at the commencement of this brief and we submit the finding is fully supported by the evidence.

Appellant in his brief (page 65) refers to the Trial Court's reference to *prima facie* violation of California Penal Code Section 337a and states:

> "Again appellant's counsel excepted to the Court's failure to inform the jury how this 'prima facie' evidence could be overcome by an instruction on entrapment and/or equitable estoppel." (App. Br. p. 65.)

The quoted statement appears to be a loose interpretation of the record. Following the Court's statement to the jury:

> "There is a prima facie violation of law when the bet is taken with the intent of transporting that money to the race track."

[R. T. 832], there was this exchange between appellant's counsel and the Trial Court:

> "Mr. Schwartz: If the Court please, I will enter at this point an exception to the Court's decision not to also inform the jury that there are

ameliorating circumstances which should be considered by the jury in viewing 337(a), including equitable estoppel.

The Court: Including entrapment?

Mr. Schwartz: Equitable estoppel." [R. T. 832, 833.]

Rule 49(a), which authorizes the use of a special verdict provides in part as follows:

"If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

In reply to appellant's assertions regarding entrapment we respectfully submit that [1] appellant waived his right to trial by jury on the issue of entrapment, if, in fact, it was a proper issue and [2] if, in fact, entrapment was a proper issue it was properly determined adverse to appellant by the Trial Court in its finding on the subject.

Further, with reference to the matter of entrapment it should be noted that the jury found there was probable cause for the arrest of appellant. Hence, even if the acts of Deputy Sheriff Cowley constituted an "entrapment" and even if the fact of such entrapment required a finding that appellant did not commit the offense for which he was arrested, nevertheless, the jury found there was probable cause for appellant's arrest and hence there was no false arrest.

Moreover it appears to be the law that the fact that entrapment may be available as a defense to a criminl charge does not alter the fact of the guilt of the accused. The basis for the defense of entrapment in California is stated in the opinion of the Supreme Court in *People v. Benford,* 53 Cal. 2d 1, 8 and 9, 345 P. 2d 928:

> "In California recognition of the defense is said to rest upon the broadly stated grounds of 'sound public policy' and 'good morals.' . . . Entrapment is a defense not because the defendant is innocent but because, as stated by Justice Holmes (dissenting in Olmstead v. United States (1928), 277 U. S. 438, 470 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376], an illegally obtained evidence case), 'it is a less evil that some criminals should escape than that the Government should play an ignoble part.' (Frankfurter, J., concurring in Sherman v. United States (1958), supra, p. 380 of 356 U.S.)"

In the concurring opinion of Mr. Justice Frankfurter to which the above quotation alludes it is further stated:

> "If he is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because the result of temptation, whether the tempter is a private person or a Government agent or informer." (356 U.S. 380.)

The position expressed in *People v. Benford, supra,* is not altered by the recent California case of *People v. Perez,* 62 A.C. 816, cited on page 67 of Appellant's

Brief. The opinion in that case declares that a defendant is not required to admit guilt in order to avail himself of the defense of entrapment, disapproving statements to the contrary in earlier cases. It does not alter the state of the law regarding the guilt of the entrapped defendant.

Conclusion.

In summary we respectfully submit:

1. The answers to the first three interrogarories under the special verdict do not amount to a finding of the commission of a tortious act or a violation of appellant's civil rights.

2. The answers to the balance of the interrogatories amount to findings that there was no malicious prosecution, no false or malicious arrest, no conspiracy between appellees, Wingard and Michel, and no violation of appellant's civil rights, findings all abundantly supported by the evidence.

3. Appellant's reliance upon "entrapment" avails him naught. The issue of entrapment was not presented by appellant under the special verdict, it was decided adversely to appellant by the Trial Court as a separate finding of fact. Even if appellant had been "entrapped" his arrest and subsequent prosecution were based upon probable cause.

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

McInnis, Focht & Fitzgerald and
James L. Focht,
Attorneys for Appellees.

Certificate (Rule 18.2(g)).

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

McInnis, Focht & Fitzgerald
and James L. Focht
By James L. Focht
Attorneys for Appellees.